

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**

JAMES DRAIN AND RACHEL DRAIN,

Plaintiffs,

vs.

CIV 04-399 MV/KBM

WELLS FARGO BANK, MINNESOTA, NA, et al.

Defendants.

**PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**  
**ON PLAINTIFFS' MOTION TO VACATE OR TO RECONSIDER**  
**AND PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT**

THIS MATTER is before the Court on the Plaintiffs' Motion to Vacate or to Reconsider Decision Granting in Part Defendant Basmajian Motion to Dismiss (*Doc. 62*). By Order of Referral entered March 1, 2005, I have been asked by the Chief Judge to make proposed findings and recommended dispositions on all dispositive motions. *See Doc. 78*. For the reasons set forth below and in Defendant's Brief in Opposition, I recommend that the motion to reconsider be denied.

Plaintiffs seek to hold Defendant Basmajian individually liable in this action, and they contend that they have properly served him. By Memorandum Opinion and Order entered January 14, 2005 (*Doc. 59*), the presiding judge disagreed and granted Defendant Basmajian's Motion to Dismiss. Having reviewed the Court's opinion and order, it accurately states the applicable law and the facts surrounding Plaintiffs' attempt to serve Basmajian. Plaintiffs, or their counsel, simply fail to understand what the law requires. Contrary to Plaintiffs' position in the

motion, they have failed to properly effectuate personal service under either federal or state procedural rules for the reasons stated in Chief Judge Vázquez' decision. Therefore, the dismissal order was properly entered.

Moreover, because Defendant Basmajian has not been properly served, the Court Clerk has properly refused to grant Plaintiffs' request for entry of default against him. *See* FED. R. CIV. P. 12(a) (a defendant is only required to plead or respond to a complaint that has been served). Therefore, Plaintiffs' Motion for Default Judgment (*Doc. 44*) is also without merit.

Wherefore,

**IT IS HEREBY RECOMMENDED** that Plaintiffs' Motion to Vacate or to Reconsider Decision Granting in Part Defendant Basmajian Motion to Dismiss (*Doc. 62*) and Plaintiffs' Motion for Default Judgment Against Basmajian T. Doyle (*Doc. 44*) be **DENIED**.

**THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 10 DAYS OF SERVICE** of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636 (b)(1). **A party must file any objections with the Clerk of the District Court within the ten day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

  
UNITED STATES MAGISTRATE JUDGE